

STATE OF MICHIGAN
COURT OF APPEALS

SHANNON WHITE and SHAYNA WHITE,

Plaintiffs-Appellants,

v

LASCO FORD, INC., and JOSHUA D. SLOAN,

Defendants-Appellees.

UNPUBLISHED

June 24, 2014

No. 314916

Genesee Circuit Court

LC No. 12-098018-CH

Before: O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's orders granting summary disposition in favor of defendants, denying plaintiffs' motion to set aside the summary disposition, and denying plaintiffs' motion to file an amended complaint. We affirm.

This action arose from disputes about the financing of two cars that plaintiffs purchased from defendant Lasco Ford, Inc. Plaintiffs, who are mother and daughter, alleged that defendant Lasco and its sales representative, defendant Joshua D. Sloan, misrepresented the terms of the financing agreements for the cars. Count I of plaintiffs' complaint alleged fraud and misrepresentation; Count II alleged violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, and Count III alleged breach of an implied covenant of good faith and fair dealing. The jurisdiction and venue section of plaintiffs' complaint included an allegation "[t]hat this matter involves . . . violation of the Motor Vehicle Installment Sales Act," but the complaint did not further allege any claim under that act.

In June 2012, the trial court granted defendants' motion for partial summary disposition under MCR 2.116(C)(8) on counts II and III, as well as any claim for violation of the Motor Vehicle Installment Sales Act. Plaintiffs do not challenge the dismissal of those claims on appeal.

Defendants thereafter moved for summary disposition on plaintiffs' remaining claim for fraud or misrepresentation pursuant to MCR 2.116(C)(10). In support, defendants submitted plaintiffs' deposition testimony and an affidavit from defendant Sloan. This evidence established that there was no genuine issue of material fact with respect to plaintiffs' allegations of fraud and misrepresentation. Plaintiffs did not file a response to defendants' motion. The trial court granted the motion.

Defendants thereafter filed a motion for costs under the offer of judgment rule, MCR 2.405(D), and plaintiffs filed a motion to set aside the order granting defendants' motion for summary disposition, or alternatively, to allow plaintiffs to amend their complaint. Plaintiffs did not appear at the hearing on these motions. The trial court granted defendants' motion for costs, but did not address plaintiffs' motion to set aside the order granting summary disposition of the fraud claim.

More than six weeks later, in December 2012, after defendants obtained a request for writ of garnishment, plaintiffs filed a motion to vacate or set aside the trial court's judgment pursuant to MCR 2.612 and to allow the filing of a first amended complaint. Plaintiffs requested relief under MCR 2.612(C)(1)(f) (any other reason justifying relief from the operation of a judgment), arguing that defendants would not be detrimentally affected if the judgment was set aside and that extraordinary circumstances existed to require the judgment to be set aside "in order to achieve justice." The trial court denied the motion.

On appeal, plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition of their fraud claim, because there are genuine issues of material fact regarding whether Sloan made misrepresentations that induced plaintiffs to purchase the new vehicles. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Defendants moved for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). A motion under subrule (C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted. MCR 2.116(G)(3)(b). MCR 2.116(G)(4) provides:

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Thus, if a party fails to respond to a summary disposition motion under MCR 2.116(C)(10), a trial court may grant summary disposition upon finding that no material factual issues exist. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996).

In this case, plaintiffs have never identified or presented factual support for their position that there were genuine issues of material fact for trial. Plaintiffs argued that they would present testimony at trial about the alleged misrepresentations. However, a proposal to offer testimony at trial is not sufficient to withstand a summary disposition motion under MCR 2.116(C)(10). See *Smith*, 460 Mich at 455 n 2 ("it is no longer sufficient for plaintiffs to *promise to offer*

factual support for their claims at trial”). Accordingly, we affirm the trial court’s order granting defendants’ motion for summary disposition.

Plaintiffs also complain that the trial court erred by failing to offer them an opportunity to amend their complaint. Plaintiffs did not request an opportunity to amend their complaint in response to defendants’ motion for summary disposition, or at the hearing on defendants’ motion for summary disposition. Further, although plaintiffs asserted in a post-judgment motion that the trial court should have given them an opportunity to amend their complaint before granting summary disposition, plaintiffs did not offer any proposed amendment in support of their request. Accordingly, we conclude that plaintiffs’ arguments relating to amendment of their complaint are unpreserved. See *Richard v Schneiderman & Sherman, PC (On Remand)*, 297 Mich App 271, 273; 824 NW2d 573 (2012). Therefore, our review of this issue is limited to plain error affecting plaintiffs’ substantial rights. *Id.*

MCR 2.116(I)(5) provides that when a motion for summary disposition is based on subrules (C)(8), (9), or (10), “the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” It is well established that a motion to amend pleadings should be denied only for particularized reasons, including undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice, or futility. *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009). “An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim.” *Lane v Kindercare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

In this case, plaintiffs did not request an opportunity to amend their complaint in response to defendants’ motion for summary disposition, or at the hearing on defendants’ motion, and they did not submit any proposed amended complaint with their post-judgment motions, or indicate to the court, orally or in writing, the basis for any proposed amendment, or explain how any amendment would not be futile. Because the record demonstrates that an amendment would not be justified in this case, we find no plain error in the trial court’s ruling.

Affirmed.

/s/ Peter D. O’Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey